

Internal Revenue Service

memorandum

CC:TL:Br3

GEBowden

date: AUG 22 1990

Tax Shelter

Project

TL-N-7279-90

to: District Counsel, San Francisco W:SF

from: Chief, Branch 3, Tax Litigation Division CC:TL:Br3

subject: Tax Shelter Project

Your memorandum of May 29, 1990 requested Tax Litigation Advice with respect to the above referenced shelter project.

ISSUE

Whether a payment ultimately applied to an addition to tax for negligence earns statutory interest from the date the payment is received to the date that the addition to tax is actually assessed.

CONCLUSION

No statutory interest is earned on such a payment. However, to the extent that the liability for the addition to tax is satisfied by the crediting of an overpayment from a different taxable year, such overpayment earns interest until the assessment date of the addition to tax.

FACTS

In many of the cases, the taxpayers made remittances in order to stop the running of interest on deficiencies. (Note that the term "advance payment" is defined by I.R.C. § 6513 to mean payments prior to the return due date and is thus presumably inappropriate here.) We assume these remittances were treated as payments of tax in accordance with the provisions of Rev. Proc. 84-58, 1984-2 C.B. 501. In many of these cases overpayments have resulted based on the terms of the accepted settlement offer. One of the provisions of this settlement is that taxpayers agree that they are liable for the I.R.C. § 6653(a)(1) addition to tax for negligence.

We note that your memorandum states that some of taxpayers' liabilities are satisfied by the crediting of overpayments from the gain leg years of this shelter.

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ANALYSIS

We will first assume that the designated payments made by a taxpayer exceed his ultimate liability for tax, interest and additions to tax. In the years at issue, I.R.C. § 6601(e) barred the accrual of interest on the negligence addition until it was assessed. Taxpayers argue that therefore that amount of their designated payments which ultimately was used to satisfy the liability for the addition to tax should be treated as an overpayment and earn statutory interest under I.R.C. § 6611 until the date that the addition to tax is assessed.

This argument is without merit. As prescribed by § 6611 statutory interest is earned from the date of overpayment. As defined by Treas. Reg. § 301.6611-1(b), the date of overpayment is the date of payment of the first amount which exceeds the taxpayer's liability for taxes, interest and additions to tax.

Taxpayers suggest that the language of sections 5.05 and 6 of Rev. Proc. 84-58 supports their position. As you discuss in your memorandum, the Rev. Proc. merely sets out procedures by which remittances to stop the running of interest may be made. It does not redefine the term "overpayment" as advocated by the taxpayers.

Nor is there any support for taxpayers' position in Treas. Reg. § 301.6611-1(h)(1) and (2)(vi) which deal solely with the crediting of overpayments from other years.

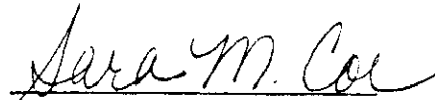
Accordingly, we concur with the position you have proposed with respect to the issue explicitly raised in your request for advice. However, we feel compelled to recognize a second issue not directly raised in your memorandum, nor apparently in any of the correspondence from taxpayer's counsel. Your memorandum states that:

the fact that the settlement offer involves netting of the gain leg year overpayment against the earliest loss year often results in an overpayment to the taxpayer who has prepaid the deficiency and interest accruing thereon.

This represents a misunderstanding of overpayment procedures. If there is a deficiency in year one and an overpayment in year two, the overpayment may be credited against the year one liability. I.R.C. § 6402. If the year two overpayment is greater than the year one liability, the difference remains an overpayment for year two; no overpayment results in year one, as seems to be implied by your memorandum. This is a critical distinction with respect to the issue you have raised. The regulations section cited above, 301.6611-1(h)(2)(vi) provides that for purposes of

credits the due date of an addition to tax is the assessment date of the addition to tax. Interest on overpayments used as credits runs from the overpayment date to the due date of the liability credited against. Therefore, if part of the year two overpayment is to be credited against a year one liability for the addition to tax for negligence, that part of the year two overpayment will continue to earn statutory interest until the addition to tax is assessed.

Thus we concur with the conclusion of your memorandum with the proviso that you recognize that statutory interest will run on portions of overpayments from the gain leg years credited against additions to tax until the addition to tax is assessed. If we can be of further assistance in this matter, please contact George Bowden at FTS 566-3407.


SARA M. COE